

BLUEPEARL VET, LLC; BLUEPEARL )  
WASHINGTON, LLC; AND BLUEPEARL )  
PRACTICE ENTITY, P.C., joint employers )  
collectively doing business as BLUEPEARL )  
SPECIALTY + EMERGENCY PET )  
HOSPITAL, )  
 ) Case: 19-UC-239832  
Petitioner, )  
 )  
and )  
 )  
 )  
NATIONAL VETERINARY )  
PROFESSIONALS UNION, )  
 )  
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 )

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## **I. INTRODUCTION**

Pursuant to 102.67(c) of the National Labor Relations Board's Rules and Regulations, BluePearl Specialty + Emergency Pet Hospital ("BluePearl" or "the Employer"), requests that the National Labor Relations Board ("NLRB" or "the Board") review the Decision and Order Clarifying Unit ("Decision") issued by the Regional Director of Region 19 on August 1, 2019, finding that the Blood Bank Director and Shift Supervisor classifications are not statutory supervisors and are therefore properly included in the Unit. As required by Section 102.67(d), compelling reasons exist for the Board's review based on the following grounds:

a. The Regional Director's Decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of BluePearl where the Regional Director failed to consider differences between departments when he analyzed the authority exercised by Shift Supervisors, applied testimony from Shift Supervisors in the smaller Specialty departments to Shift Supervisors in the Emergency Room ("ER"), and overlooked or failed to consider evidence of supervisory status in the record.

b. The Regional Director's Decision raises a substantial question of law and policy because the Decision fails to apply Board precedent regarding the analysis and application of the Board's Section 2(11) test. Specifically, the Regional Director erred by failing to separately analyze each Shift Supervisor's job duties to determine whether the Shift Supervisors have authority to exercise supervisory indicia; failing to apply the Board's decision in *Oakwood* and progeny with regard to patient assignment in the ER and the assignment criteria in general; failing to apply Board law and concluding that Shift Supervisors do not have requisite authority to hire or discipline simply because a higher level manager is involved at some point in the process; and

failing to apply Board law applicable to individuals who have the authority to “effectively recommend” decisions of a supervisor nature.

In sum, the Regional Director ignored undisputed, uncontroverted record evidence regarding the job duties performed by the Shift Supervisors, failed to differentiate between Shift Supervisors in the ER and Shift Supervisors in Specialty Departments despite that there is a substantial difference in job duties, and failed to apply the proper legal analysis for determining supervisory status under Section 2(11) status.<sup>1</sup>

## **II. BACKGROUND**

BluePearl operates a full-service veterinary hospital in Seattle, Washington. (Baker, Tr. 14:13-16). On or about June 8, 2018, the Board certified the National Veterinary Professionals Union (“Union”) as the exclusive bargaining representative of employees in the following unit: “All full-time and regular part-time non-professional employees employed by the Employer’s facility located at 13240 Aurora Avenue N., Seattle, Washington.” Excluded from the unit are “professional employees, assistant practice managers, doctors/veterinarians, veterinary technician managers, medical directors, practice managers, office clericals, managers, and guards and supervisors as defined in the Act.” The Client Service Manager was neither included nor excluded from the unit and voted subject to challenge.

On April 17, 2019, BluePearl filed a Unit Clarification Petition with Region 19 because the initial certification was unclear and the parties disagreed as to whether certain classifications were statutory supervisors or office clericals. As reflected by the UC Petition, BluePearl proposed modifying the description of the bargaining unit as follows:

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<sup>1</sup> The Regional Director factual and legal errors are discussed more specifically throughout the Employer’s Request for Review.

**Included:** All full-time and regular part-time non-professional employees employed by the Employer's facility located at 13240 Aurora Avenue N., Seattle, Washington.

**Excluded:** professional employees, assistant practice managers, doctors/veterinarians, veterinary technician managers, shift supervisors, medical directors, practice managers, office clericals including but not limited to purchasing coordinators, managers, client service manager, and guards and supervisors as defined in the Act.

Joint Board Exhibit 1.

The Region held a Unit Clarification hearing to receive evidence on April 30 through May 3, 2019, and May 15 and 16, 2019. Although the parties called several of the Shift Supervisors to testify, the parties did not call all of the Shift Supervisors because – as the parties agreed on the record – the testimony would have been duplicative. Thus, testimony was heard from at least one Shift Supervisor from each department, except for the kennel area. As noted specifically below, while Shift Supervisors all have the same level of authority, there are some meaningful differences in their job duties and responsibilities, which may affect how that authority is exercised. Thus, whether a Shift Supervisor is a Section 2(11) supervisor must be analyzed on a case-by-case basis if the evidence in the record is mixed or is materially different based on the Shift Supervisor's department or particular responsibilities.

On August 15, 2019, the Regional Director issued his Decision and Order Clarifying Unit. Specifically, the Regional Director concluded that (1) the Client Service Manager is a statutory supervisor properly excluded from the bargaining unit; and (2) that the Blood Bank Director and the Shift Supervisors are not statutory supervisors and should be included in the bargaining unit. Notably, the Regional Director acknowledged that the evidence in the record was “mixed” and did not analyze supervisor status on a case-by-case basis as required by Board precedent.<sup>2</sup> *See Dole Fresh Vegetables*, 339 NLRB 785 (2003); *Modesto Radiology*, 361 NLRB 888 (2014); *Oakwood*

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<sup>2</sup> (Decision, p. 17-18, noting “as with other areas of the record the evidence is mixed”)

*Healthcare, Inc.*, 348 NLRB 686 (2006). Further, the Regional Director declined to address the status of the admitted office clerical based on the relitigation rule.

The Employer now seeks review of the Regional Director's decision pursuant to Section 102.67 of the Rules and Regulations with regard only to the Section 2(11) supervisor status of the Blood Bank Director and the Shift Supervisors. The Employer does not appeal the Regional Director's decision regarding the Customer Care Manager found to be a statutory supervisor nor his decision regarding the office clerical.

### **III. STATEMENT OF FACTS**

#### **A. Description of the Company's Operations**

BluePearl operates a full-service veterinary hospital in Seattle, Washington. (Baker, Tr. 14:13-16). The North Seattle hospital is organized into five departments: Emergency, Specialties, Client Care, Kennel, and Blood Bank. (Baker, Tr. 53:15-54:18; Er. Ex. 66). Each department generally has one Shift Supervisor; however, the ER department has five Shift Supervisors because it operates 24 hours per day, seven days per week unlike the other departments at the hospital. (Baker, Tr. 16:19-23; 17:2-3; 19:20-21:5).

BluePearl employs four administrative managers. These individuals are Katy Baker (Hospital Administrator), Lindsey Walker (Assistant Practice Manager), Jessica Anderson (Tech Manager), and Brandi Ohashi (Client Service Manager).<sup>3</sup> (Baker, Tr. 10:20-23; 16:15-23). The Shift Supervisors for the Emergency and Specialty departments report to Ms. Anderson. (Baker, Tr. 15:6-16). The Shift Supervisor for Kennel reports to Ms. Walker. (Baker, Tr. 16:24-17:3). The Blood Bank Director reports to Ms. Baker and to Dr. Jennifer Waldrop. (Baker, Tr. 16:19-23;

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<sup>3</sup> Ms. Ohashi's status as a Section 2(11) supervisor was at issue in this proceeding. As noted above, the Regional Director concluded that Ms. Ohashi is a Section 2(11) supervisor.

Mensing, Tr. 688:10-17). The Technicians, Assistants, Referral Coordinators and Financial Coordinators<sup>4</sup> working in ER and Specialty departments report to the Shift Supervisor for their respective departments and on their particular shift. (Baker, Tr. 15:9-10; 18:21-19:3; Er. Ex. 66). The Kennel Assistants report to the Shift Supervisor in Kennel. (Baker, Tr. 75:22-76:8). The Client Care Coordinators and the Client Care Lead report to the Client Service Manager, Ms. Ohashi. (Walker, Tr. 75:7-11; Baker, Tr. 733:25-734:4; 735:2-6)

For clarity, the employees at issue in this proceeding are listed below.

	Name	Job Title	Department	Manager	No. of Direct Reports
1.	Amanda Pawlik	Shift Supervisor	Specialty - Internal Medicine & Cardiology	Jessica Anderson	6
2.	Jamie Pawlik	Shift Supervisor	Specialty-Oncology	Jessica Anderson	7
3.	Melissa Bjorland	Shift Supervisor	Specialty-Surgery	Jessica Anderson	4
4.	Alex Futran	Shift Supervisor	Emergency	Jessica Anderson	2
5.	Taylor Berge	Shift Supervisor	Emergency	Jessica Anderson	1
6.	Kylie Smith	Shift Supervisor	Emergency	Jessica Anderson	2
7.	Mackenzie Rich	Shift Supervisor	Emergency	Jessica Anderson	5
8.	Emily Spahr	Shift Supervisor	Emergency (floater)	Jessica Anderson	0
9.	Kandice Beier	Shift Supervisor (Kennel Lead)	Kennel	Lindsey Walker	5
10.	Michelle Mensing	Shift Supervisor (Blood Bank Director)	Blood Bank	Katy Baker & Dr. Waldrup	0
11.	Brandi Ohashi	Client Service Manager	Client Care	Lindsey Walker	8

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<sup>4</sup> In relation to the Shift Supervisors, the bargaining unit employees are often referred to as “direct reports” because they report directly to Shift Supervisors. Each Shift Supervisor has direct reports that work on their same shift. (Rich, Tr. 1066:2-6).

**B. The Blood Bank Director**

Michelle Mensing is the Blood Bank Director at the North Seattle hospital. (Baker, Tr. 50:3-17; Mensing, Tr. 682:12-20). The Blood Bank at North Seattle (“Blood Bank”) is one of three blood banks operated by BluePearl. (Baker, Tr. 51:23-25). The Blood Bank collects blood from pets and makes it available to other clinics and hospitals for use during treatments. (Baker, Tr. 51:17-25)

As the Blood Bank Director, Ms. Mensing is responsible for the marketing and operations of the Blood Bank. (Baker, Tr. 52:1-53:5; Mensing, Tr. 685:11-18). Specifically, she works with corporate headquarters in Tampa to develop brochures, identify trade shows, and creates protocols for the Blood Bank. (Mensing Tr. 700:13-25; 701:1-12; 702:1-15). Notably, Ms. Mensing is responsible for increasing profitability of the Blood Bank. In that role, she generates quarterly reports regarding the profitability of the department and meets with upper management (Ms. Baker, Ms. Waldrop, Ms. Walker, and Ms. Anderson) on a quarterly basis to discuss the department’s profitability and how to increase the same. (Mensing, Tr. 698:21-699:22; 705:22-706:3). Ms. Mensing is considered a member of management. (Baker, Tr. 52:23-53:5).

Ms. Mensing has one direct report generally, though the position was currently vacant at the time of the hearing. She participated in the hiring process by completing a working interview and by giving feedback and recommendation regarding the individual’s hire. In addition, she is responsible for directing the individual’s work, evaluating the individual’s performance as necessary, and making decisions regarding her schedule. (Baker, Tr. 51:7-13; 52:6-8).

**C. The Shift Supervisors in Emergency and Specialty**

**1. Shift Supervisor Job Duties as Described in Their Job Description**

As accurately reflected by the Shift Supervisor job description, “the Shift Supervisor acts as Manager on Duty to provide supervisory presence during assigned shifts, focusing on hospital operational flow and safety/security.” (Er. Ex. 1). More specifically, Shift Supervisors are responsible for partnering with clinicians to plan and organize workflow for the shift; supervising shift technicians/assistants, monitoring performance and productivity...; communicating with technicians and assistants regarding policies, standards, and performance; participating in management meetings; and, identifying performance issues and working with management to coach for improvement. (*Id.*). Further, shift supervisors are responsible for providing feedback used during annual evaluations. (Baker, Tr. 24:17-26:3; Walker, Tr. 82:6-17).

In addition to the formal job duties identified on the Shift Supervisor job description, the North Seattle hospital circulated a supplemental list of responsibilities. (Er. Ex. 60). Relevant supplemental job duties include assigning ICU patients to specific assistants and/or technicians; allocating staff members from Inpatient to Outpatient as needed due to caseload; delegating staff members to areas of hospital; making decisions about sending associates home; approving called in absences and deciding if additional help is needed for the shift; answering questions; training new staff; attending supervisor meetings; and monitoring and addressing problems as appropriate. (*Id.*). Notably, the Shift Supervisor responsibilities were distributed to Ms. Pawlik and Ms. Bjorland, both of whom were considered Shift Supervisors at the time. (A. Pawlik, Tr. 478:21-479:5; Bjorland, Tr. 377:1-7; 378:8-10; 378:18-379:5).

## **2. Shift Supervisors Make Effective Hiring Recommendations**

Shift Supervisors play a critical role in hiring new team members. Specifically, Shift Supervisors conduct “working interviews” to determine whether the candidate has requisite technical skills for the position and/or would be a good fit with the team. (Baker, Tr. 43:17-44:3;

Anderson, Tr. 212:17-214:8). During the working interview, the Shift Supervisor is responsible for observing the candidate during a 1-2 hour “hands-on” interview and for providing feedback and a hiring recommendation on the candidate to Ms. Anderson. (*Id.*) Although Ms. Anderson conducts a preliminary screening interview, she relies on - *and always follows* - the Shift Supervisor’s recommendation in deciding whether to hire an applicant because the Shift Supervisor is best able to assess the applicant’s skills and abilities to perform the job. (Anderson, Tr. 158:5-11). Notably, Ms. Anderson does not do an independent review following the working interview. (Anderson, Tr. 217:2-22).

### **3. Shift Supervisors Evaluate their Direct Reports, Which Directly Impacts Merit Wage Increases**

Shift Supervisors are responsible for evaluating the work performance of their direct reports. As Ms. Anderson explained, for the first 90 days of a new associate’s employment, she will personally check in with the associate at the two, four, and six-week mark to ensure things are going well. (Anderson, Tr. 158:12-16). Ms. Anderson then conducts a 90-day review of the associate based on the feedback provided by the Shift Supervisors. (Anderson, Tr. 158:17-19). However, after the 90-day review, Ms. Anderson takes a step back and the Shift Supervisors take over evaluation responsibilities going forward. (Anderson, Tr. 158:20-21). Shift Supervisors are expected to evaluate their direct reports by coaching “in the moment” and by having more formal monthly meetings.<sup>5</sup> (Baker, Tr. 25:2-11; Anderson, Tr. 189:22-190:15).

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<sup>5</sup> Supervisors are assigned “direct reports” in Ultipro. (Anderson, Tr. 207:5-6). Ultipro is the employee management software used by BluePearl. (Walker, Tr. 78:3-8). Examples of Shift Supervisors coaching in the moment are reflected in Employer Exhibits 32, 37, and 49. Documentation regarding the monthly meetings that Shift Supervisors have with their direct reports is at found in the record at Employer Exhibits 25 and 26.

In addition to coaching “in the moment,” Shift Supervisors provide feedback for a new associate’s 90-day review and also for the associate’s annual review. (Anderson, Tr. 158:17-19; 208:9-20). The 90-day feedback<sup>6</sup> provided by Shift Supervisors is informal and the feedback provided for the annual review process is extensive. For the 2017 annual review, for example, each Shift Supervisor was required to complete a detailed written evaluation on her direct reports. (Walker, Tr. 81:25-83:18). The evaluation was provided to the Practice Manager, Alison Dietz, who, in turn, took the numerical rating and written comments provided by the Shift Supervisor and transferred them into the associate’s formal written evaluation. (*Id.*). Although the Practice Manager also solicited feedback from the doctors and from some Technicians and Assistants, the Shift Supervisor’s evaluation and comments were included in the reviews and, in many cases, were included verbatim. (*See* Er. Ex. 2 and Er. Ex. 6; Er. Ex. 3 and Er. Ex. 10, Er. Ex. 11; Er. Ex. 4 and Er. Ex. 7, Er. Ex. 8; Er. Ex. 5). At least one Shift Supervisor, Melissa Bjorland, presented the evaluation by herself directly to her team. (Bjorland, Tr. 412:11-15)

At BluePearl, there is a direct relationship between merit wage increases and associate performance evaluations. (Walker, Tr. 90:9-10; Anderson, Tr. 210:1-14). As Ms. Walker testified, in early 2018, BluePearl allocated to North Seattle a bucket of money to be used for annual merit increases. (Walker, Tr. 79:11-80:16). The Practice Manager was responsible for allocating money within the hospital and used the evaluations provided by the Shift Supervisors to determine the merit increase given to each associate. (Walker, Tr. 79:11-81:2, 83:6-18) Thus, there is a direct link between the Shift Supervisor’s annual evaluation and the associate’s merit increase. In simplest terms, employees with higher evaluation scores received higher merit wage increases.

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<sup>6</sup> Examples of the 90-day feedback provided by Shift Supervisors is at Employer Exhibits 15, 16, 32, 50, 61, and 64.

#### **4. Shift Supervisors Effectively Recommend Discipline**

Shift Supervisors have the authority to effectively recommend discipline and do, in fact, effectively recommend discipline for their direct reports. As Ms. Anderson testified, she has very few interactions with Techs and Assistants after their first 90 days of employment and consequently she does not directly oversee their work performance. (Anderson, Tr. 158:17-21). Instead, Ms. Anderson meets with all Shift Supervisors monthly or bi-monthly to discuss their direct reports. (Anderson, Tr. 161:6-16). This gives Ms. Anderson a general understanding of where the Shift Supervisors are at with their direct reports and whether they have concerns. (Anderson, Tr. 190:4-19). If a Shift Supervisor has concerns, Ms. Anderson will discuss those concerns with them and both she and the Shift Supervisor will decide how to proceed based on the severity of the concern. (*Id.*). Shift Supervisors have the authority to independently coach in the moment and to give verbal warnings when they deem necessary and appropriate. (*Id.*, Tr. 190:16-191:16). If the matter cannot be resolved through coaching and counseling, the Shift Supervisor has authority to recommend (and does recommend) written disciplinary action. (*Id.*). Thus, even though Ms. Anderson is involved in disciplinary decisions, Shift Supervisors play a critical role in those decisions, including but not limited to making effective recommendations. Shift Supervisors play far more than just a reporting role in discipline process.

#### **5. Shift Supervisors Assign Work**

All Shift Supervisors are responsible for “managing the flow of the day” within their department. Managing the flow of the day generally requires a Shift Supervisor to make decisions regarding the assignment of work, patients, and scheduling. For example, at the beginning of each shift, the ER Shift Supervisor must assign ICU patients to staff members based on patient needs and associate skill level/licensure. (Anderson, Tr. 262:9-264:5). ER Shift Supervisors generally

evaluate the patient's condition, required treatments, time associated with the treatments, needs of the other patients in the ICU, and the skill level of all associates on duty in the ER.<sup>7</sup> (Futran, Tr. 786:12-787:23). In some cases, the ER Shift Supervisor will deviate from the regular occurring Inpatient/Outpatient schedule rotation<sup>8</sup> based on patient needs. (Futran, Tr. 774:1-775:9). Thus, ER Shift Supervisors are assigning patients to staff, but are also deciding whether to move an associate from Inpatient to Outpatient (and vice versa) based on patient care needs. (*Id.*). Shift Supervisors make these decisions based on their own independent judgment and do not rely on hospital guidelines, protocols, or training blocks.

Shift Supervisors also manage the flow of the day by deciding whether to fill open shifts created by unexpected, in the moment call-outs or vacant shifts. To do this, Shift Supervisors evaluate the needs of the floor to decide whether additional help is necessary. (Berge, Tr. 4-17; Anderson, Tr. 176:25-177:13) Although some Shift Supervisors may seek input from other members of their team before making a decision, Shift Supervisors have authority to make this decision independently and do not to (and do not) consult with Ms. Anderson or any other member of management. (Rich, Tr. 1027:11-1029:14). Notably, all Shift Supervisors are also responsible for handling call-outs that may occur in their respective departments. Thus, if an associate calls out before his or her shift, the Shift Supervisor must use her independent judgment to determine whether to call someone else in to work based on the needs of the department for that day.

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<sup>7</sup> The Shift Supervisors in the Specialty departments are also responsible for assigning work and generally managing the flow of the day. (Er. Ex. 1).

<sup>8</sup> Techs and Assistants working in the ER generally rotate between Inpatient and Outpatient on a weekly basis with one Assistant and one Technician assigned to each department each week. However, the Shift Supervisor must decide whether to deviate from the regular rotation based on patient needs and associate skills. (Futran, Tr. 774:1-775:9).

Shift Supervisors also modify shift start and stop times. If a Shift Supervisor determines it is or will be a slow day, the Shift Supervisor can independently decide to ask an employee to come in late or leave early. (Anderson, Tr. 172:11-18). The Seattle Shift Correction Logs (see Er. Exhibit 28) reflect numerous instances where a Shift Supervisor called an associate in to work, asked an associate to come in late, or asked an associate to leave early. In fact, the Seattle Shift Correction Logs reflect at least 24 examples of a Shift Supervisor adjusting the start/stop time of a shift or calling another associate in to work, which triggers an employee bonus. (Er. Ex. 28). Further, while a Shift Supervisor cannot require a Tech or Assistant on straight time to modify their scheduled shift, Shift Supervisors can require associates who will incur overtime to go home early or come in late. (Futran, Tr. 801:13-22). Even when work is not slow, Shift Supervisors have the independent authority – and regularly exercise such authority – to let associates go home early.<sup>9</sup>

## **6. The Lead Scheduler's Additional Scheduling Duties**

Ms. Futran, a Shift Supervisor in the ER, receives five hours of “Admin” time each week to create the schedule for all Techs, Assistants, and Referral Coordinators in the hospital. (Futran, Tr. 770:23-771:13). Ms. Futran starts the scheduling process with a master schedule template. The schedule template includes all regularly occurring work shifts/assignments for a designated time period. (Futran, Tr. 847:19-848:24). Ms. Futran must revise the schedule to account for paid time off (PTO), unexpected absences, vacant shifts, holiday preferences, family emergencies, shift change requests, and training schedules.

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<sup>9</sup> In at least one instance, a Shift Supervisor rewarded employees who stayed late to assist on a case. Specifically, as reflected by Employer Exhibit 55, Ms. Bjorland gave employees on her team a call-in bonus because she felt it was appropriate. When the Practice Manager questioned her noting that call in bonuses are not awarded for staying late, Ms. Bjorland held her ground because she felt a call-in bonus was appropriate and suggested that she and the Practice Manager sit down and talk.

Because Ms. Futran is the most knowledgeable about scheduling, she makes frequent scheduling decisions or effective recommendations related to the same. (Er. Ex. 27, Er. Ex. 67, Er. Ex. 69, Er. Ex. 70). For example, Ms. Futran approves routine PTO requests.<sup>10</sup> (Futran, Tr. 759:24-760:3). Ms. Futran estimates that PTO is routinely approved approximately 80% of the time. During the other 20% of the time, however, Ms. Futran and Ms. Anderson will review the request together and make a decision.<sup>11</sup> (Er. Ex. 71, Er. Ex. 72, Er. Ex. 74, Er. Ex. 75). Although Ms. Anderson has the final authority to approve or deny a PTO request, Ms. Futran is generally the one who reviews the schedule and the circumstances of the request to make a preliminary decision/recommendation, which Ms. Anderson routinely and consistently accepts. Thus, Ms. Futran makes effective scheduling decisions.

Ms. Futran is also responsible for adjusting work schedules during the holidays when associates frequently compete for time off. Because the hospital operates 24 hours per day, 365 days per year, associates do not automatically receive holidays off and may have to work even if the holiday falls on a regularly scheduled day off. (Futran, Tr. 743:6-744:22). To ensure that holiday scheduling is fair, associates complete a holiday preference sheet identifying the top three holidays they would like to have off. (*Id.*). Ms. Futran selects which associates will work based on volunteers, preferences, and equity. (Er. Ex. 68). Again, Ms. Futran decides which employees will work, or makes an effective scheduling recommendation, which is consistently followed by Ms. Baker and/or Ms. Anderson.

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<sup>10</sup> PTO is generally approved if the associate has enough PTO to cover the absence, the request is submitted in advance, and there is otherwise sufficient coverage in the hospital. (Futran, Tr. 758:2-759:23)

<sup>11</sup> For example, if another Tech or Assistant also requested the same day off, the request will be denied. If the employee does not have enough PTO, the request will be denied, but the employee can trade with someone. (Futran, Tr. 760:4-761:23)

To begin the holiday scheduling process, Ms. Futran starts with the master schedule. She removes any associate with an approved time off request. (Futran, Tr. 743:6-744:22). She then adds additional shift hours to the schedule to create optimum coverage for the day. (*Id.*). She then determines whether any associates volunteered to work and, if so, starts filling vacant shifts. (*Id.*). If there are enough volunteers to fill the vacant shifts, Ms. Futran will consult the holiday preference sheets and will start removing associates from the schedule if the holiday is their first or second preference. (*Id.*). When there are not enough volunteers for everyone to have the holiday off, Ms. Futran unilaterally assigns associates to work even if it is not their normal workday. (Futran, Tr. 827:19-23). Ms. Futran uses independent judgment to decide which associate will work on what days and generally considers the type of shift at issue (i.e. Tech or Assistant), the skill level of the associate, the associate's tenure with BluePearl, the number of holidays previously worked, and whether the associate has worked other holidays against their preference. (Futran, Tr. 828:5-22). Notably, Ms. Futran makes these decisions independently although she will inform the upper management team (Ms. Baker, Ms. Anderson, Ms. Walker) during their regular scheduling meetings. (Futran, Tr. 831:8-19).

Ms. Futran also creates the training schedules for new employees. Specifically, Ms. Futran designates a new associate to a particular shift that usually differs from their regularly assigned shift and pairs the associate with experienced employees who can teach the new associate how things are done at BluePearl. New associates are typically paired with Shift Supervisors if possible and the training period lasts approximately three weeks. (Futran, Tr. 830:21-831:1). Thus, Ms. Futran sets the training shift, the trainers, and the order of the training. (Futran, Tr. 754:18-757:21). After Ms. Futran creates the training schedule, Ms. Futran shows it to Ms. Anderson, Ms. Baker,

and Ms. Walker in case they have any input. (Futran, Tr. 757:22-758:1). The training schedule set by Ms. Futran is routinely approved without question or comment. (Er. Ex. 75).

#### IV. ARGUMENT

A. **The Regional Director's Decision on a Substantial Factual Issue Is Clearly Erroneous on the Record and Such Error Prejudicially Affects the Rights of a Party.**

1. **The Regional Director Failed to Analyze Each Shift Supervisor Individually When and Made a Blanket Determination Based on the "Mixed" Evidence in the Record.**

It is well established that supervisory status under Section 2(11) is based on an individual's job duties. Thus, the Regional Director must conduct an individualized assessment of each individual's job duties if the evidence in the record establishes that Shift Supervisors have different levels of authority, or exercise that authority in different ways. See *Dole Fresh Vegetables*, 339 NLRB 785 (2003); *Modesto Radiology*, 361 NLRB 888 (2014); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). Although the Shift Supervisor's authority in this case is generally uniform, there is one critical difference in their job duties that impacts the Section 2(11) analysis that requires a more refined analysis. Specifically, Shift Supervisors in the ER exercise greater independent judgment and authority in assigning patients to staff on a daily basis. Thus, in this regard, the Regional Director erred by failing to analyze and consider those differences and this failure prejudiced the rights of the Employer.

In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), the Board rejected the parties' stipulation that all charge nurses have the same authority based on the evidence in the record. Specifically, the Board noted that charge nurses in the emergency room do not exercise the same level of independent judgment as charge nurses in other departments when making patient care assignments. Thus, the Board went on to analyze whether the charge nurse in each department met

the Section 2(11) criteria and concluded that *certain* charge nurses were supervisors while others were not. *Id.* at 697-699; see also *Modesto Radiology*, 361 NLRB 888 (2014) (rejecting the union’s argument that evidence of supervisory authority regarding one “lead” employee should be considered applicable to all employees in the same title).

Likewise, in *Dole Fresh Vegetables*, 339 NLRB 785 (2003), the Board rejected the employer’s argument that supervisory authority on the part of some “leads” should be found for all “lead” employees because, according to the employer, “all leads possess the same level of authority.” The Board noted that “[t]he status of a supervisor under the Act is determined by an individual’s duties, not by his title or job classification.” *Id.* at 785 (quoting *T.K. Harvin & Sons*, 316 NLRB 510, 530 (1995)).

Here, the Regional Director erred by failing to analyze Section 2(11) status on a case-by-case basis where record evidence showed differences in levels of authority and how that authority is exercised by some Shift Supervisors. While Shift Supervisors have the same title and share some general responsibilities, the evidence in the record shows that Shift Supervisors’ job duties may vary based on several factors, including the Shift Supervisor’s department, shift, and number of direct reports. For example, some Shift Supervisors manage teams of up to six or seven direct reports while other Shift Supervisors have no direct reports. Further, because the workload in the ER is often unpredictable, Shift Supervisors in the ER exercise independent discretion in certain areas (such as assigning patients to staff) while Shift Supervisors in the Specialty Departments have more control over their workloads and may work more collaboratively and with more input from the doctor. Because of these differences in job duties, the Regional Director should have analyzed supervisory status on a case-by-case basis. Instead, the Regional Director completely ignored testimony offered by some Shift Supervisors, while crediting testimony offered by others

and applying it to the entire group of Shift Supervisors. For this reason alone, the Regional Director erred on factual matters that prejudicially affect BluePearl's rights under the Act.

**B. The Specific Evidence in the Record Shows that Shift Supervisors Should be Excluded From the Bargaining Unit Pursuant to Section 2(11) of the Act**

**1. Legal Standard Applicable to Section 2(11)**

Section 2(11) of the Act defines a "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

The supervisory authorities are listed in the disjunctive. Thus, if an individual possesses even *one* of the authorities listed in Section 2(11), that individual is a "supervisor" if the individual (1) holds the authority to engage in any one of the 12 listed supervisory functions, (2) the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) the authority is held in the interest of the employer." *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001).

In *Oakwood Healthcare*, 348 NLRB 686, 688 (2006), the NLRB delineated the difference between "true supervisors" and non-supervisory leaders as follows:

"... the dividing line between these two classes of workers, for purposes of Section 2(11), is whether the putative supervisor exercises 'genuine management prerogatives.' Those prerogatives are specifically identified as the 12 supervisory functions listed in Section 2(11) of the Act. If the individual has authority to exercise (or effectively recommend the exercise of) at least one of those functions, 2(11) supervisory status exists, provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion but with independent judgment."

To establish "independent judgment," a person must "at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing

data.” *Id.* at 693. Conversely, judgment is not independent where it is “controlled by detailed instructions, whether set forth in company policies ... verbal instructions from a higher authority, or in the provisions of a collective bargaining agreement.” *Id.* Further, the authority to “effectively recommend” an action “generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.” *DirectTV*, 357 NLRB No. 149 (2011) (quoting *Children’s Farm Home*, 324 NLRB 61 (1997)).

**2. The Regional Director Erred in Finding that Shift Supervisors Do Not Have Authority to “Assign”**

**a. All Shift Supervisors Have the Authority to “Assign” Work; However, Shift Supervisors May Exercise that Authority Differently Depending on their Department**

The term “assign” means “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, 348 NLRB at 689. In the healthcare setting, the Board noted, the term “assign” encompasses the responsibility for assigning nurses and aides to particular patients. *Id.* For example, a charge nurse designating an LPN as the person who regularly administers medication to a patient or group of patients is “assigning” work in a supervisory capacity, while a charge nurse ordering an LPN to immediately give a sedative to a particular patient is not. *Id.*

Further, the Board will typically find the authority to assign present where assignments are based on the putative supervisor’s individual assessment of the employee’s skills in relation to the needs of the patients. *Oakwood Healthcare*, 348 NLRB at 689; *Community Medical Center*, 2007 NLRB Reg. Dir. LEXIS 182 (2007). (Designation of employees to care for particular patients in

ER is plainly a form of assignment; securing substitutes for absent employees would also constitute assignment since it involves a determination of work hours.)

All Shift Supervisors are generally responsible for “managing the flow of the day.” In this capacity, Shift Supervisors have the authority to make several decisions — all of which involve the use of independent judgment. For example, as discussed in more detail below, evidence in the record shows that Shift Supervisors have authority to (1) assign patients to staff, (2) adjust shift times based on business needs, and (3) fill open shifts created by call-outs or otherwise vacant shifts. In addition, ER Shift Supervisors use their independent judgment to decide whether to deviate from the established Inpatient/Outpatient schedule rotation in the ER. These decisions require Shift Supervisors to use independent judgment and meet the “assignment” criteria discussed by the Board in *Oakwood. Oakwood Healthcare*, 348 NLRB at 689 (rejecting parties’ stipulation that all supervisors possess same authority where evidence in the record to the contrary and applying an individualized assessment of each department supervisor). Further, while all Shift Supervisors have authority to make these decisions—the method by which they exercise their authority, however, may deviate by department.

**b. ER Shift Supervisors assign patients to staff in ICU**

The Regional Director erroneously relied on the testimony of a few Shift Supervisors in the Specialty Departments to conclude that staff-to-patient assignments in the ER, i.e. who will cover which patients and who will perform what procedures, are made by a “collaborative process whereby knowledgeable employees are dividing work between themselves and making shared decisions.” (Dec. at p. 9). However, the testimony of the ER Shift Supervisors does not reflect the use of a collaborative process and an individualized inquiry/analysis is necessary under the Board’s decision in *Oakwood*. Although the Shift Supervisors in the smaller, specialty departments

testified that they chose to make their decisions collaboratively,<sup>12</sup> testimony regarding the practices in Specialty Departments should not be applied across the board to the ER Shift Supervisors.

By comparison, the ER Shift Supervisors do not follow a collaborative process when assigning patients to staff. Ms. Futran testified that at the beginning of each shift, the ER Shift Supervisor assigns patients in the ICU to a particular Tech or Assistant. When no Shift Supervisor is on duty during a given shift, the Shift Supervisor from the previous shift assigns patients to particular staff. (Futran, Tr. 789:18-25) (Mackenzie facilitates assignments before she leaves at 1:00 a.m.). Ms. Futran unequivocally testified as follows:

So the shift supervisor is responsible for assigning patients in the ICU. And so that means that even if I'm the outpatient tech for the day, I'm still assigning whoever's going to be inpatient, their patients...[b]ased on looking at what that patient's treatments are going to be for the day... So when I come in, one of my responsibilities as the lead is double-checking those treatment sheets. So during that time that I'm double checking is when I'm gaining the information that I use to know who to appropriately assign to one person or the other.

So I'll use information like...they have a disease. That means that they're likely to need a transfusion...and their numbers have been dropping overnight. So it's likely that this pet might need a transfusion today. Maybe I'll stick this pet with the LVT because they're going to be able to set up that transfusion.

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<sup>12</sup> Because the smaller specialty teams follow a set schedule each day and will know ahead of time how many patients are on their schedule for the day, they are not required to bend and flex like the ER team. (Futran, Tr. 763:7-25) This predictability gives them more control over patient assignments. While the Shift Supervisors are ultimately responsible for assigning patients to staff, some of the Shift Supervisors in the Specialty departments testified that they discuss patient assignments amongst themselves. For example, the Internal Medicine Shift Supervisor, Amanda Pawlik, testified that she and the other Tech divide the cases up between them and that she seeks input from the other Assistant in the department regarding what cases interest her. (A. Pawlik, Tr. 479:25-480:23) The Oncology Shift Supervisor testified that they “group up together in the morning, decide how we want our day to flow.” (J. Pawlik, Tr. 571:21-25). The Surgery Shift Supervisor testified that with regard to patient assignments, “Ideally, we kind of try to discuss it as a team in the morning and plan out our day, as far as what makes the most sense in regards to timing. If there's one case that's a bit more critical or somebody's not comfortable with. . . we kind of determine who would take that case.” (Bjorland, Tr. 380:8-17). Notably, this nearly consistent testimony was coached and not credible.

So the baseline of how I make those decisions is basically to make the most efficient patient care and the appropriate skills needed for particular patients.

(Futran, Tr. 782:25-783:20)

Assigning patients to staff in this manner meets the “assignment” criteria described in *Oakwood*, supra. In *Oakwood*, the Board concluded that “[i]n the health care setting, the term ‘assign’ encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients.” *Oakwood*, supra, at p. 689. In fact, the Board went on to acknowledge that:

choosing among the available staff frequently requires a meaningful exercise of discretion. Matching a nurse with a patient may have life and death consequences. Nurses are professionals, not widgets, and may possess different levels of training and specialized skills. Similarly, patients are not identical and may require highly particularized care. A charge nurse’s analysis of an available nurse’s skill set and level of proficiency at performing certain tasks, and her application of that analysis in matching that nurse to the condition and needs of a particular patient, involves a degree of discretion markedly different than the assignment decisions exercised by most leadman.

*Oakwood*, supra, at p. 695.

Like the charge nurses in *Oakwood*, the ER Shift Supervisors at BluePearl are making the same types of decisions when assigning a Vet Tech or Assistant to critical patients in the ER. Further, Shift Supervisors in the ER are making these decisions independently—there is no protocol, policy, or training block governing how such decisions are made. Shift Supervisors are responsible for assigning particular patients in the ICU to a specific Tech or Assistant (as opposed to assigning a Tech and Assistant to the ICU generally and allowing them to choose how they treat patients).

As noted by Ms. Futran, she is using her independent judgment by weighing the condition and anticipated needs of a patient against the skills and special training of available personnel. Further, which patients need a specialized level of care is not always obvious. Moreover, except

for “red dot” patients,<sup>13</sup> ICU patients can often be treated by a Tech or by an Assistant with advanced skills. (J. Pawlik, Tr. 636:12-25). Thus, to make appropriate and critical patient assignments, the ER Shift Supervisor reviews the patient treatment sheets and listens to medical information presented during rounds to evaluate the best, most efficient assignment for the patient and the ER based on the skill level and abilities of the four associates on duty. (Futran, Tr. 782:21-786:8). The Board has recently reaffirmed that such assignments “determine what will be the required work for an employee during the shift, thereby having a material effect on the employee’s terms and conditions of employment,” and therefore constitute “giving significant overall tasks to an employee.” *Arc of S. Norfolk*, 2019 NLRB LEXIS 437, \*12 (2019).

Once a Shift Supervisor in the ER makes the initial patient assignments for the day, the Shift Supervisor on the following shift must then decide whether to keep the existing assignments or to make changes. (Futran, Tr. 784:1-14). According to Ms. Futran, the Shift Supervisor who follows her (also an LVT) will generally follow her Inpatient assignments if the Shift Supervisor is covering Outpatient that week. (Futran, Tr. 787:9-788:14). If the Shift Supervisor is Inpatient, however, she will reassess the Inpatient assignments and possibly change them. (*Id.*). Further, if an Assistant (as opposed to a Technician) is taking over for Ms. Futran, patient assignments may also need to change depending on skill level. (*Id.*). When there is no Shift Supervisor assigned to a shift,<sup>14</sup> the Shift Supervisor on the previous shift is responsible for assigning patients on the next shift. (Futran, Tr. 788:15-790:11).

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<sup>13</sup> A “red dot” patient is one who is critical and needs a dedicated Technician to care for it during the entire shift. (Anderson, Tr. 309:9-12).

<sup>14</sup> There is no Shift Supervisor in the ER from Sunday-Wednesday, 1:00 a.m. to 6:00 a.m. (Tr. 789:6-9)

Given the unequivocal testimony of the ER Shift Supervisors described above, the Regional Director's reliance on *Golden Crest Healthcare Center* for the proposition that assignments made for the purpose of equalizing workload are routine and do not involve the exercise of independent judgment is misplaced for two reasons. First, in *Golden Crest Healthcare Center*, the charge nurse lacked supervisory indicia to "assign" where the charge nurse's role was limited to altering a CNA's section assignment to compensate for absent employees or to balance workloads. There was no evidence in that case to suggest that the charge nurse was assigning particular patients to staff based on an evaluation of the CNA's skills and the patient's medical needs. Further, the charge nurse in that case could not require a CNA to alter his or her existing assignment. Second, the Board in *Oakwood* held that while decisions based "solely on the basis of equalizing workloads" do not involve independent judgment, charge nurses who "assign each member of the nursing staff the number and type of patients that each staff member is capable of handling during the shift" do in fact use independent judgment. *Id.* at 697. Thus, according to the Board, the charge nurses in *Oakwood* did more than merely equalize workloads because they "assess[ed] the quantity of work to be assigned, the relative difficulty of the work involved, and the competence of the staff available to do the work." *Id.* The same result applies here where Shift Supervisors assign patients to staff based on an evaluation of patient need and employee skills. Thus, the Regional Director's conclusion is not supported by the record.<sup>15</sup>

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<sup>15</sup> Further, the Regional Director's reliance on *KGW-TV*, 329 NLRB 378, 381-382 (1999) and *Veolia Transportation Services*, 363 NLRB No. 188, Slip op. at 7-8 (2016) and *Springfield Terrace LTD*, 355 NLRB 937, 943 (2010) is equally misplaced as none of these cases relate to the assignment of patients to staff. In *KGW-TV*, for example, the Board held that the assignment of story coverage in a newsroom is a collaborative effort on the part of all involved, particularly where the assignments were made after a daily planning meeting. Further, the Board's decision in *Veolia Transportation Services* is limited to whether the supervisors there have authority to discipline or to effectively discipline. Lastly, while the *Springfield Terrace* case relates to

**c. Shift Supervisors in the ER Decide Whether to Deviate from Inpatient/Outpatient Rotation**

Evidence in the record further establishes that Shift Supervisors exercise discretion in deciding whether to deviate from established Inpatient and Outpatient rotations based on patient needs and employee skills. Such decisions are supervisory in nature when the associate “weighs the individualized condition and needs of a patient against the skills or special training of nursing personnel.” *Oakwood Healthcare, Inc.* 348 NLRB 686 (2006); *Kindred Hospital South Bay*, 2015 NLRB Reg. Dir. Dec. Lexis 22. For example, Ms. Futran explained that she deviates from the rotation if there is a critical pet assigned to a Technician that does not have significant experience, in her opinion, in critical care nursing. In such a circumstance, she would assign the critical pet to herself even though she was scheduled to work in Outpatient for the week. (Futran, Tr. 774).

Likewise, Ms. Rich also testified that she deviates from the Inpatient/Outpatient rotation when necessary using independent judgment to match patients with staff. According to Ms. Rich, sometimes the doctor will advise her to deviate from the rotation, sometimes she will just know that it needs to happen based on her judgment, and sometimes the other Shift Supervisor will tell her that it has already happened. (Rich, Tr. 1023). Ms. Berg also testified that she has authority to deviate from the inpatient/outpatient rotation and does so when dictated by patient care needs. (Berg, Tr. 960:24-961:19). As an example, Ms. Berg testified:

Q Are there occasions when a skilled assistant might attend to a red dot patient as well?

A Yes

Q And when might that occur?

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scheduling in general, there was no contention that putative supervisors were responsible for assigning patients to staff.

**A It just depends, I guess, on the patient's status.... If they're needing to be intubated or something, then an assistant can't do that. So it depends on like, how critical they are, or like why they're sick. If they're just generally kind of not doing well, and maybe they're on their way to being intubated or something, an assistant could theoretically take care of them up until a certain point.**

**Q Are there any occasions when you've made the decisions as to whether it should be a skilled assistant or a tech to tend to a red dot patient?**

**A Yes. . . when they're like maybe not doing really well, and then it's like a red dot, but they get to a point where they now need more medications or they need to be intubated or, you know, an technician level—they're going to end up needing a technician, at which point then I'm like okay, this is I'm going to have to take this patient over now. Like if Kandice and I were in the ICU together, and she was taking care of it, and it gets sick enough to a point at which then I have to take it over, I guess, yes, but also probably the doctor is going to say it first.**

**Q But there are times when you make that decision that you'll take the red dot patient over from Kandice?**

**A Yes**

(Berg, Tr. 964:15-965:18).

This testimony unequivocally shows that Ms. Berg, as the ER Shift Supervisor, has the authority to assign patients to staff and to deviate from any existing inpatient/outpatient rotation. Further, as reflected by Ms. Berg's testimony, she makes this decision based on her evaluation of the patient's condition and the skills required to treat the patient based on available staff in the ER. This ability to deviate from the established inpatient/outpatient rotation is the precise type of decision that implicates supervisory indicia under the Board's decision in *Oakwood* and progeny. It is undisputed that Shift Supervisors in the ER have authority to deviate from the schedule rotation and do exercise that authority. In fact, each Shift Supervisor deviates from the scheduled rotation at least once or twice per month on average. Deviations during the summer months are even more frequent. (Rich, Tr. 1025-1026:16)

**d. All Shift Supervisors have authority to change associate schedules**

The Regional Director acknowledged that Shift Supervisors use independent discretion and judgment to adjust staffing levels within their departments based on patient need. (Decision at p. 19) (“The record establishes that shift supervisors do, on occasion, request that employees leave early or delay their start time when patient volume is low” etc.). However, the Regional Director dismissed this evidence of supervisory status based on the erroneous belief that supervisors cannot require schedule changes. (*Id.*). The Regional Director overlooked key testimony in the record which shows that Shift Supervisors can, in fact, require associates to go home early. Specifically, Ms. Futran testified that she can involuntarily send associates on overtime home even if the associate is scheduled to work. This undisputed testimony is sufficient to satisfy the “assign” criteria of Section 2(11). (Futran, Tr. 870:22-24) (Q: “If someone’s on OT, can you send them home involuntarily? A: Yes).

**e. All Shift Supervisors have authority to change shifts and decide whether to fill open shifts**

Shift Supervisors have the independent discretion to fill open shifts created by an unexpected call-out or because of a vacant shift. (Er. Ex. 36, Er. Ex. 39). In making such decisions, Shift Supervisors evaluate the needs on the hospital floor. Specifically, Ms. Futran makes the decision based on her evaluation of how critical the hospitalized patients are, how labor intensive the hospitalized patients are, and the types and frequency of the treatment needed. (Futran, Tr. 803:11-21) Ms. Rich also testified that she decides whether to call in a Tech or Assistant based on the hospital’s case load. If, for example, a Tech calls out, Ms. Rich will assess whether she needs a Tech or an Assistant based on patient needs. (Rich, Tr. 1031:18-1032:15). Although some Shift Supervisors will seek input from other members of their team, Shift Supervisors have authority to

make this decision independently and are not required to consult with Ms. Anderson or any other member of management. (Rich, Tr. 1027:11-1029:14). As Ms. Rich testified:

Q Do you have to consult Jessica before you make a decision to call someone in?

**A No.**

Q And what about allowing a tech to leave early. Do you have the ability or authority to allow a tech to leave early?

**A Yes.**

(Rich, Tr. 1028:10-15)

Q Is the decision whether to call someone in your decision as a Shift Supervisor?

**A Yes, but I ask input of other people and I can be overruled.**

Q So who would overrule you?

**A Like if Alex were to disagree<sup>16</sup>, maybe, and say I think you'll be fine, try to do this, or if like Jessica says, I'm here, I can help you instead of having to call somebody in, or something like that.**

Q Okay. Are there occasions when you make a decision to call someone in without consulting Jessica?

**A Yes.**

Q Do you have to consult Jessica before you make a decision to call someone in?

**A No.**

Q And what about allowing a tech to leave early. Do you have the ability or authority to allow a tech to leave early?

**A Yes.**

(Rich, Tr. 1027:23-1028:15) Moreover, the hospital does not have a written policy regarding patient-to-staff ratios, and the decision to call someone in to fill an open shift is entirely

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<sup>16</sup> Notably, "Alex" refers to Alex Futran, another Shift Supervisor.

discretionary and results in additional compensation for the Technician or Assistant called in. (Anderson, Tr. 171:20-172:18).

Shift Supervisors also use independent judgment to modify shift start/stop times and have the authority to let associates go home early based on the needs of the hospital.<sup>17</sup> If a Shift Supervisor determines it is a slow day, the Shift Supervisor may ask an employee to come in late or leave early. As reflected by the Seattle Shift Correction Logs in the record (Er. Exh. 28), Ms. Rich sent herself home early on June 10, called in an off-duty employee (Linda Ness) on June 10, and called in Kiley Smith on August 8. On December 9, 2018, Ms. Rich called in Emily Spahr, Vicki Adams, and Linda Ness late because it was slow. Ms. Rich also called Kareena Story in late on December 10; and called in Kareena Story, Emily Spahr, and Bri Larson late on January 14, also because it was slow. Melissa Bjorland called in Amira Leon on August 8. Emily Spahr called in Taylor Berge and Joe Gallegos on October 20 and called in Alex Futran on December 12 because it was busy. In fact, there are at least 24 examples of Shift Supervisors adjusting the start/stop time of a shift or calling someone in to work in Employer Exhibit 28. Further, while Shift Supervisors cannot require associates to come in late/leave early if they do not want to, Shift Supervisors can involuntarily send associates on overtime home.<sup>18</sup> These decisions are discretionary in nature and satisfy the assign criteria of Section 2(11).

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<sup>17</sup> Shift Supervisors also have the authority to revise schedules on a permanent basis. As reflected by Employer Exhibit 34, Jamie Pawlik adjusted an associate named Stephanie's schedule by changing her start time from 8:00 a.m. to 8:10 a.m. Melissa Bjorland sought to modify Carmen King's schedule and asked her to modify her days. (Er. Ex. 43; see also Er. Ex. 45) Amanda Pawlik asked Rixie Pham to revise her schedule temporarily during Thanksgiving week. (Er. Ex. 59) Jamie Pawlik made a recommendation regarding the schedule of new hire, Josh Reilly. (Er. Ex. 65)

<sup>18</sup> Additionally, Ms. Baker testified that although Ms. Beier has not yet had the opportunity to make the decision to send an employee home early because she is new to the position, she certainly has the authority to make and carry out such a decision. (Baker, Tr. 85:3-15). Ms. Baker also testified that although Ms. Mensing currently does not have any employees reporting to her, Ms.

**f. A Shift Supervisor makes effective scheduling decisions and recommendations for all Techs and Assistants and performs a Section 2(11) job duty**

The Regional Director also ignored key, undisputed evidence in the record regarding Ms. Futran's scheduling duties and concluded, without explanation, that scheduling issues are brought to management and therefore do not implicate Section 2(11). The Regional Director's conclusion is an oversimplification of a complex process and fails to acknowledge that Ms. Futran does not merely bring issues to management. Rather, as reflected by Ms. Futran's own testimony, she makes effective scheduling recommendations which require independent judgment and are sufficient to satisfy Section 2(11) criteria.

As noted above, the Section 2(11) term "assign" means, in part, the act of appointing an employee to time (such as shift or overtime period)." *Oakwood Healthcare*, 348 NLRB at 689. Further, to exercise independent judgment, "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Id.* A judgment is not independent if "it is dictated or controlled by detailed instructions" or if there is "only one obvious and self-evident choice." *Id. at 693*. As noted above, Ms. Futran unilaterally assigns associates to work (i.e. appoints an employee to a shift) even if it is not their normal workday. (Futran, Tr. 827:19-23). In doing so, Ms. Futran considers multiple factors including the type of shift at issue (i.e. Tech or Assistant), the skill level of the associate, the associate's tenure with BluePearl, the number of holidays previously worked, and whether the associate has worked other holidays against their preference. (Futran, Tr. 828:5-22). In doing so, Ms. Futran is weighing these factors for more than one associate to determine which associate

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Mensing was responsible for their schedules when she did have direct reports and will be in the future after hiring a direct report. (Baker, Tr. 46:2-8; 51:7-8).

should be required to work. While Ms. Futran makes these decisions independently, she will discuss her decisions with the management team (Ms. Baker, Ms. Anderson, Ms. Walker) in their regular scheduling meetings. (Futran, Tr. 831:8-19).

Here, Ms. Futran creates the work schedule for all Techs and Assistants at the hospital. (Futran, Tr. 742:13-21). In doing so, Ms. Futran is responsible for modifying the schedule based on business needs and available staff. In this role, she makes actual scheduling decisions and effectively recommends many others. (Futran, Tr. 847:19-848:24). Such recommendations include recommending that an employee come in at 7:30 instead of 6:30; recommending the lunch break schedule for all shifts; and recommending permanent changes to an associate's schedule. These decisions meet the "assign" criteria in *Oakwood* because the recommendations are effective and accepted by management. While Ms. Futran may not have independent authority to make these decisions, she nonetheless makes effective recommendations to management who, in turn, accept her recommendations.

Further, as described above from page 12 to 15, Ms. Futran approves PTO requests even when they fall outside of BluePearl's PTO guidelines, changes shift start/stop times of shifts when requested or necessary, assigns specific associates to work holidays when there are not enough volunteers, and creates training schedules—assigning staff to particular days and parts of the hospital. Moreover, Ms. Futran is responsible for making scheduling recommendations based on her independent judgment. For example, in one circumstance reflected in Employer Exhibit 71, an associate lacked sufficient PTO to cover her PTO request. Ms. Futran sought input from Ms. Baker who, in turn, asked Ms. Futran what she was thinking of doing. Ms. Futran responded that she would be "willing to approve" the request based on staffing levels at the hospital.

In addition, as mentioned above, Ms. Futran uses independent judgment to create “training schedules” for new hires. As reflected by Employer Exhibit 40-42 and 74-75, Ms. Futran assigns new hires to both a shift and to a specific area of the hospital. While Ms. Futran has an established process for creating a training schedule, it’s her own process and is not guided by employer policies or protocols. Employer Exhibit 40, for example, shows that Ms. Futran assigned a new hire to four different shifts and four different areas of the hospital. This evidence contradicts the Regional Director’s unsupported assertion that scheduling at the North Seattle hospital involves a series of steps or is otherwise determined by management. Ms. Futran is responsible for training schedules and training schedules meet the assignment criteria described in *Oakwood*.

In fact, all of the aforementioned scheduling tasks are of the type credited by the Board’s decision in *Oakwood* and require a Shift Supervisor to use her discretion and independent judgment in making or recommending decisions related to scheduling. Further, the decision cited by the Regional Director, *Bakersfield Californian*, 316 NLRB 1211(1995), is distinguishable from this case. In that case, a pre-*Oakwood* decision, the Board concluded that the scheduler did not exercise independent judgment in scheduling because the employees worked regular schedules, requested vacation in advance, and all conflicts were resolved by seniority. The evidence in this record, however, shows that Ms. Futran uses independent discretion to resolve scheduling conflict or to make effective recommendations. The Regional Director’s conclusion that Ms. Futran’s functions are not supervisory because scheduling issues are brought to management is factually inaccurate and ignores the undisputed testimony in the record showing that she exercises independent judgement in scheduling, or, at the very least, makes effective scheduling recommendations when she brings scheduling issues to upper management.

**3. The Regional Director Erred in Finding that Shift Supervisors Do Not Make Effective Hiring Recommendations.**

The Regional Director concluded that Shift Supervisors do not exercise supervisory authority in the hiring of candidates because department managers participate in the initial screening process. The Regional Director's narrow and erroneous view of Board precedent must be rejected. In fact, the Board has often found supervisory status for those who make effective hiring recommendation even where the ultimate decisionmaker participated in the interview process.

The Regional Director relies on the Board's decision in *Children's Farm Home*, 324 NLRB 61 (1997), for the proposition that authority to effectively recommend an action means that the manager with the ultimate authority conducts "little independent investigation." Contrary to the Regional Director's application of the case, other BluePearl management does not engage in the type of in-depth investigation necessary to defeat this indicia of supervisory status. Thus, the Regional Director's cite to *Children's Farm Home* is misplaced. *Children's Farm Home* concerned the potential supervisory status of team leaders at a youth care facility. However, it did not evaluate hiring recommendations. Instead, it dealt with the evaluation of employees and recommendations on merit increases. The record evidence there showed that the team leaders merely made "advisory and preliminary" recommendations to superiors on evaluations. Since merit increase recommendations were inextricably tied into the evaluation process it followed that superiors likewise conducted their own reviews to determine whether raises were warranted. *See Id.* at 61. *Children's Farm Home* is therefore easily distinguishable on the facts.

In *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007) the Board found that a front desk supervisor ("FDS") possessed authority to make effective hiring recommendations even though the supervisor's manager would have still interviewed the applicant as "part of the process." The Board held that the FDS possessed supervisory authority to effectively recommend

against hiring because his recommendations were “very, very key.” Indeed, although no specific examples of hiring recommendations were provided in that decision, the FDS’ superior testified that a recommendation not to hire “would be fatal” to an application. On that basis, the Board held that the evidence established that the FDS had authority to make effective recommendations on hiring.

The same conclusion is dictated here by the evidence. As in *Sheraton Universal*, a manager’s participation in the hiring process should not defeat the strong indicia that Shift Supervisors both have the authority to effectively make hiring recommendations *and* actually exercise that authority. Practice Manager Katy Baker testified on that authority:

Q. So does the shift supervisor actually make a hiring recommendation?

A. **Absolutely.**

Q. And do you, generally, follow the recommendations of the Shift Supervisors?

A. **Yes.**

(Baker, Tr. 44).

The Vet Tech Manager likewise explained that she gave significant weight to Shift Supervisor hiring recommendations. As she explained:

Q. Does a shift supervisor make a recommendation about hiring after the working interview?

A. **Yes.**

Q. Do you follow that recommendation?

A. **I do.**

Q. If a shift supervisor was to tell you, no, this person's not a good fit, would you take that, or would you just ignore that?

A. **I would take that.**

(Anderson, Tr. 213). Anderson also testified that she always followed Shift Supervisors' hiring recommendation:

Q. Can you think of anytime where you didn't follow a shift supervisor's recommendation on hiring?

A. **No.**

(Anderson, Tr. 217). These clear and unequivocal statements of supervisory authority are just as strong as those relied on by the Board in *Sheraton Universal*. See also *Berger Transfer & Storage*, 253 NLRB 5, 10 (1980) (supervisory status found even though salesperson's recommendation to hire was followed by interviews with company officials because his recommendation against hiring a candidate was normally final).

Moreover, this authority to recommend is not hypothetical, but is regularly exercised by various Shift Supervisors. As detailed at the hearing, the last, and most crucial, step in the hiring process is the "working interview" conducted by Shift Supervisors. They use this specific type of interview to assess the candidate's skill set and technical abilities. (Baker, Tr. 43:17-44:3; Anderson, Tr. 212:17-214:8). They then follow-up with recommendations on hiring. That input is the "most important" because Shift Supervisors will be working with individuals on a "day to day basis." (Anderson, Tr. 214:2-5).

The record is full of examples in which Shift Supervisors effectively made recommendations on job candidates. For example:

- Shift Supervisor Rich recommended that Ms. O'Donnell and Mr. Burton should be hired. Ms. Anderson accepted those recommendations without further review despite her own concerns about one of those applicants. (Anderson, Tr. 214).
- Ms. Rich also testified that she had made recommendations that BluePearl *not* hire applicants two times. Those recommendations were followed in both cases. (Rich, Tr. 1052-1054)

- Shift Supervisor Bjorland recommended the hire of Ms. Miller, which Ms. Anderson accepted without additional review. (Bjorland, Tr. 433:20-22).
- Shift Supervisor Futran has made at least two hiring recommendations that Ms. Anderson adopted without question. (Futran, Tr. 804:18-807:9).
- Shift Supervisors Bjorland and Berge also recommended that BluePearl *not* hire two candidates, including one that Ms. Berge could uniquely comment on based on prior negative experiences with this candidate. In both cases the candidate was not hired. In the second instance, the candidate was not even selected for an initial screening interview based on Ms. Berge's recommendation. (Anderson Tr. 215:11-217:1).
- Ms. Mensing also testified that she was directly involved in interviewing the only direct report she has had so far in her tenure as a Shift Supervisor. Ms. Mensing noted that it was important for her to determine whether the candidate was actually able to perform the job, and she brought the candidate in to perform a blood donation in front of a pet owner. Following the interview, Ms. Mensing discussed the candidate with Dr. Waldrop and Ms. Bateman, and Ms. Mensing conveyed that she believed the candidate would be a good fit and wanted to move forward with hiring. The candidate was ultimately hired, and Ms. Mensing testified that the decision was made jointly by herself, Dr. Waldrop, Ms. Bateman, and upper management. (Mensing, Tr. 692:11-694:17)

In summary, significant evidence exists that Shift Supervisors have regularly exercised their authority to making hiring recommendations, including recommendations not to hire.

As Ms. Anderson testified, she has essentially rubber-stamped the Shift Supervisor recommendations without question because she trusts their judgment. The fact that she has *always* followed these recommendations strongly suggests supervisory status. Indeed, the Board does not even require such exactitude. For example, in *Venture Industries*, 327 NLRB 918, 919-20 (1999), the Board found that supervisors had the authority to effectively recommend transfers and promotions even though managers followed supervisors' recommendations only 80 to 90 percent of the time. In that same decision, the Board found authority to recommend discipline even though a suspension recommendation was only followed about 75 percent of the time and the manager conducted his own investigation about 30 to 40 percent of the time. *Id.*

The Regional Director also asserts that the working interview process diminishes the recommendation authority of the Shift Supervisors. That is incorrect. The mere fact that nonsupervisory employees, such as veterinary doctors and hourly employees, may participate in that process is not controlling. In *Detroit College of Business*, 296 NLRB 318 (1989), department coordinators were found to have authority to effectively recommend hiring of candidates even though several individuals participated in the interview process and the final decision to hire was a “joint decision.” *Id.* at 319. As in *Detroit College*, the Shift Supervisors here actively run the interview process and they, above all others, are the ones making effective recommendations to upper management.

Finally, the Regional Director seems to suggest that the recommendations of the Shift Supervisors should not be given substantial weight because they only evaluate soft skills such as a candidate’s communication skills and perceived attitude. First, this analysis ignores record evidence to the contrary. As Ms. Baker explained, the purpose of the working interview is to give Shift Supervisors the opportunity to assess not only how a candidate “will mesh with the team,” but also each candidate’s “skill set” and “overall competencies.” (Baker, Tr. 43:30-44:3). Ms. Bjorland concurred in this assessment, explaining that, while there plainly is a personality component, the working interview allows Shift Supervisors to determine the competency level of candidates on discrete work tasks. (Bjorland, Tr. 391:14-392:6).

In any event, the Regional Director’s unsupported attempt to diminish the recommendations of the Shift Supervisors must be rejected. If there are several qualified candidates for a position, then the most important factor in determining which candidate to hire may be the candidate’s attitude and ability to work collaboratively with the team. As Courts have explained in other contexts, the Board and its Regional Directors should not act as a “super-

personnel” department by substituting their own business judgment for that of an employer. *See, e.g., NLRB v. GATX Logistics, Inc.*, 160 F.3d 353, 357 (7th Cir. 1998). The same principle applies in this context. The Regional Director does not get to decide what factors matter. The record evidence shows that Shift Supervisors evaluate those factors that they consider to be important and make recommendations based on such factors. Those recommendations are effective, and the record shows that management gives them significant weight. Thus, the Regional Director’s decision in this regard is clearly erroneous based on the facts in the record and fails to properly apply Board precedent.

#### **4. Shift Supervisors Effectively Recommend Discipline**

The Regional Director’s conclusion that Shift Supervisors do not effectively recommend discipline is contrary to the facts in the record and Board precedent. Section 2(11) requires only that a supervisor possess authority to carry out or effectively recommend discipline, even if there is no proof that the authority has been exercised. *Sheraton Universal Hotel*, 350 NLRB 1114 (2007). Further, the effective recommendation of discipline “need not encompass the authority to make disciplinary decisions unilaterally.” (*Id.* at 1116 n.4.) *See Sheraton Universal Hotel*, 350 NLRB 1114 (2007). Instead, the Board has found supervisory status when the individual initiated the disciplinary process by bringing concerns to management. For example, in *Sheraton Universal Hotel*, the Board found disciplinary authority where the front desk supervisor conducted coach-and-counsel sessions with a subordinate and later recommended that the subordinate receive the most severe discipline possible for his conduct and the individual’s recommendation was accepted. (*Id.* at 1116.)

Likewise, in *Progressive Transportation Servs.*, 340 NLRB 1044 (2003), the Board found that a deck lead supervisor named Yozzo possessed authority to effectively recommend discipline

when she brought potential disciplinary issues to her supervisor, who then chose the level of discipline and told Yozzo how to draft the notice. The Board noted:

The credited testimony shows that, even if Yozzo does not issue discipline entirely on her own, she uses independent judgment to effectively recommend discipline to Farinacci . . . [W]hen Yozzo makes a disciplinary recommendation to Farinacci, discipline is in fact imposed. Furthermore, Yozzo has the authority to decide whether a dispatcher's conduct warrants a discipline recommendation to Farinacci at all, or whether Yozzo should simply handle the matter herself with a verbal reprimand

*Progressive Transp. Serv., Inc.* 340 NLRB at 1045.

The Regional Director acknowledged that Shift Supervisors “coach in the moment,” but concluded that such coaching is not disciplinary and does not lead to effective recommendations of discipline. The Regional Director also concluded, despite record evidence to the contrary, that Shift Supervisor's input is merely reportorial because a manager may also be involved in the discipline. While Shift Supervisors do coach in the moment,<sup>19</sup> they also make effective disciplinary

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<sup>19</sup> There are many examples of Shift Supervisors coaching in the moment. For example, Ms. Rich has coached Assistant Abigail O'Donnell because she “dropped the ball on a case.” (Rich, Tr. 1048:7-1052:8). When Ms. Rich found out, she verbally counseled Ms. O'Donnell and told her that she dropped the ball, failed to advocate for her patient, and blamed other people for her mistakes. (*Id.*) Ms. Rich further admonished Ms. O'Donnell for her unacceptable conduct. (*Id.*) Ms. Rich also spoke with Ms. Anderson regarding several other associates on her shift. Ms. Rich reported Ms. Larson's tardiness and asked Ms. Anderson to speak with her. (Rich, Tr. 1059:1-17). Ms. Rich also raised concerns regarding errors with Joe Gallego's lab work and his failure to complete treatments on time. (Rich, Tr. 1037:14-1039:9). Ms. Rich had three to four coaching sessions directly with Ms. Adams regarding her inability to get along with others and then memorialized the concerns. (Rich, Tr. 1047:12-1048:16). Ms. Rich also coached Taryn Holley for similar reasons. (Rich, Tr. 1034:15-1035:5). Lastly, Ms. Rich has coached Ms. Story regarding her overall work performance — telling her that she was slow at her treatments and that she needed to work on focusing better to get things done more efficiently. (Rich, Tr. 1033:15-1034:7).

Ms. Smith has coached and counseled Vet Assistant Abigail O'Donnell on several occasions. According to Ms. Smith, she observed Ms. O'Donnell training the Kennel Lead on CPR — a skill she didn't know much about and was not signed off on. (Smith, Tr. 1081:11-1085:25). Ms. Smith reported the issue to Ms. Anderson and directed Ms. O'Donnell not to train others on CPR. (*Id.*) In fact, Ms. Smith had three meetings with Ms. Anderson to discuss her concerns with Ms. O'Donnell. (*Id.*)

recommendations. For example, Ms. Futran recommended that Amira Leon, Vet Assistant, should be demoted. (Futran, Tr. 883:4-884:8). Ms. Futran testified as follows:

Q And did you in fact make observations about Amira's performance?

A Yes.

Q And what did you observe?

A **That she wasn't meeting the requirements of the day to day job duties.**

Q And did you provide feedback to Claire, Allison, and Lindsay about Amira's performance?

A Yes.

Q And was Amira ultimately demoted?

A Yes.

Q ... did you provide feedback suggesting that Amira should be demoted?

A Yes.

Ms. Futran's unbiased testimony demonstrates that she has authority to effectively recommend discipline. In fact, Ms. Futran observed Ms. Leon's poor work performance; chose to bring her concerns to Ms. Whitmer, Ms. Dietz, and Ms. Walker; stated that Ms. Leon should be demoted; and Ms. Leon was in fact demoted based on Ms. Futran's effective recommendation.

Likewise, Ms. Rich testified that she initiated several discussions with Ms. Anderson about Mr. Burton's performance. (*Id.*) Ms. Rich chose to bring to Ms. Anderson that Mr. Burton was not equipped to be in the position he was in, that he should not remain in the position, and that he is not fit to be an Assistant on the night shift at all. (*Id.*) Further, Ms. Rich told Ms. Anderson she

did not think “he’s good where he’s at” and understood there would be a change in Mr. Burton’s employment based on her feedback. (Rich, Tr. 1041:7-21). Ms. Anderson relied exclusively upon Ms. Rich’s feedback and made the decision to remove Mr. Burton from his shift, as recommended by Ms. Rich.<sup>20</sup>

Ms. Bjorland coached and counseled Eric Fuller regarding his attitude and recommended the implementation of a performance improvement plan. (Er. Exs. 30 and 31). Ms. Bjorland’s notes reflect, “spoke about Erik and his poor attitude and not providing assistance to Charlotte because it was after 10 am.” (*Id.*) A few months later, Ms. Bjorland requested a meeting with management and her doctor to discuss “next steps or action plans for Erik’s PIP.” (Er. Ex. 32)

Although Shift Supervisors routinely and frequently counsel their direct reports, the examples discussed above show that Shift Supervisors possess authority to effectively recommend discipline. Most notably, Ms. Futran and Ms. Rich initiated disciplinary action and recommended the removal of an employee on their shift. Based on their feedback and recommendation, BluePearl made the decision to demote both individuals, which establishes an effective recommendation for purposes of Section 2(11) criteria.

The fact that a manager may have ultimately approved of the decision does not undermine the effective recommendation. As noted, a Shift Supervisor “need not encompass the authority to make disciplinary decisions unilaterally.” *See Sheraton Universal Hotel*, 350 NLRB 1114, 1116 n.4 (2007). Further, the ability to decide whether a Shift Supervisor’s conduct warrants a discipline recommendation to a manager at all, or whether the Shift Supervisor should simply handle the matter herself with a verbal reprimand establishes supervisory indicia. *Progressive Transp. Serv.*,

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<sup>20</sup> At the time of the hearing, the decision to demote Mr. Burton had not been implemented in order to allow the Union an opportunity to bargain the discipline.

*Inc.* 340 NLRB at 1045. Here, the evidence in the record shows that both Ms. Futran and Ms. Rich used their discretion and chose to recommend discipline under certain circumstances.

The facts in the decisions cited by the Regional Director are materially different than the facts of this case. For example, in *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 7 (2016), road supervisors who witnessed operators committing an infraction was expected to fill out an observation notice. The observation notice did not prompt the road supervisor to recommend any action nor was there any examples of a road supervisor taking disciplinary action. Instead, the observation notice was forwarded to a senior supervisor who was responsible for taking disciplinary action. Thus, under that narrow set of facts, the Board held that completion of the observation notice was merely reportorial. Likewise, in *Loyalhanna Health Care Associates*, 332 NLRB 933, 935 (2000), the putative supervisor's role in the disciplinary process was limited to describing an incident on a pre-printed disciplinary form. Further, the evidence in the record established that the putative supervisors were not required to recommend particular discipline and that they "may" but "seldom do" so. The statement is then independently investigated to determine what, if any discipline, is warranted. Given the evidence in this record, specifically regarding the effective disciplinary recommendations made by Ms. Rich and Ms. Futran, the Regional Director erred in concluding that Shift Supervisors do not discipline within the meaning of Section 2(11).

##### **5. Shift Supervisors Participate in the Evaluation Process, Which is Directly Tied to Merit Increases**

Shift Supervisors' participation in the evaluation process demonstrates supervisory authority because the evaluation scores directly affect merit wage increases. The preparation of evaluations that directly affects wages or job status is an exercise of supervisory authority. *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997); *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995); *Wal-Mart Stores*, 335, NLRB 1310 (2001); *Hillhaven*

*Rehabilitation Center*, 325 NLRB 202, 201 (1997); *Bayou Manor Health Center*, 311 NLRB 955 (1997).

The Regional Director noted that the evidence regarding the roles the shift supervisors and department managers play in the evaluation process does not paint a clear picture of defined responsibilities and concludes that the department manager is ultimately responsible for the evaluation. Contrary to the Regional Director's assertion, the evidence in the record is clear: Shift Supervisors extensively evaluate their direct reports by providing narrative comments and numerical rankings; Shift Supervisors provide those evaluations to the Practice Manager; the Practice Manager discusses the evaluation with the Shift Supervisor and incorporates the Shift Supervisors' evaluation into a composite evaluation, which may also include some feedback from the physicians. Finally, the Practice Manager uses the evaluations as a basis for determining merit increases for associates.

Although the Practice Manager plays some role in compiling associate evaluations, it is undisputed that the Shift Supervisors completed 2017 annual evaluations in February/March of 2018 for their team. As reflected by Exhibits 2-5, Jamie Pawlik, Amanda Pawlik, Melissa Bjorland, and Alex Futran<sup>21</sup> each provided numerical ratings and written comments for each of their direct reports. Although one Shift Supervisor may have referred to her evaluation as a "rough draft," that does not change the fact that Shift Supervisors complete evaluations (that are incorporated into the final evaluation almost verbatim) that are directly tied to merit increases.

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<sup>21</sup> All Shift Supervisors are responsible for completing annual evaluations, but some of them have not had an opportunity yet. For example, Emily Spahr, Mackenzie Rich, Taylor Berg, Kandice Bier, and Michelle Mensing are all fairly new to the role. In addition, the parties delayed the 2019 evaluation process, by agreement and without prejudice to their legal positions, because of collective bargaining and the UC proceeding. As a result, evaluations that would have been completed by the Shift Supervisors in March 2019 have not been completed.

(See Er. Exs 2-8, 10, and 11). In fact, at least one Shift Supervisor (Melissa Bjorland) physically sat with the former Practice Manager, Alison Dietz, to finalize the annual reviews for her direct reports. Ms. Bjorland testified that she created the evaluation spreadsheet (Er. Ex. 4), gave it to Ms. Dietz, and then sat with Ms. Dietz to complete the final evaluation. The final evaluation was based on feedback provided by Ms. Bjorland and the two doctors in surgery.<sup>22</sup> (Bjorland, Tr. 407:21- 409:1)

The fact that the feedback is, in turn, used by the Practice Manager to determine annual merit increases does not undermine the Shift Supervisor's supervisory status. Ms. Walker is the only witness who was actually involved in the 2017 evaluation/merit increase process. According to Ms. Walker, the hospital was given a set amount of money to be divided amongst the employees. Ms. Walker and Ms. Dietz used the yearly performance reviews to determine wage increases in that an employee who received a higher numeric rating was in turn eligible for a larger wage increase. (Walker, Tr. 79:14-80:16; 83:10-18). Because Shift Supervisors were responsible for evaluating their direct reports, and using the numeric rating system, and because those evaluations were directly tied to merit wage increases, supervisory indicia is present regardless if the Practice Manager was involved in the evaluation process. *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997); *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995); *Wal-Mart Stores*, 335, NLRB 1310 (2001); *Hillhaven Rehabilitation Center*, 325 NLRB 202, 201 (1997); *Bayou*

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<sup>22</sup> Although Ms. Dietz suggested that some of Ms. Bjorland's numerical ratings should change, Ms. Bjorland refused to change them based on her evaluation of the individual's performance. (Bjorland, Tr. 409:2-22) For example, Ms. Bjorland recalls discussing Ms. Gratoreaux's evaluation with Ms. Dietz. According to Ms. Bjorland, Ms. Dietz suggested that Ms. Gratoreaux should receive a "2" in the "Drive for Results" category, while Ms. Bjorland felt she should receive a "3." (Bjorland, Tr. 410:17-23) Yet, looking at the final evaluation given to Ms. Bjorland, Ms. Gratoreaux received a "3" as Ms. Bjorland suggested. (Er. Ex. 7) Moreover, the comments in Ms. Gratoreaux's evaluation are virtually identical to the written feedback provided by Ms. Bjorland. And, Ms. Bjorland (not Ms. Dietz) delivered the final reviews to her direct reports.

*Manor Health Center*, 311 NLRB 955 (1997). In fact, the Regional Director’s assertion that because the department manager is ultimately responsible for the evaluation and the resulting merit increases, does not undermine the evaluations provided by the Shift Supervisors or the link between those evaluations and the resulting merit increases.

**6. All Shift Supervisors Have the Same Supervisory Authority and are Section 2(11) Supervisors Even If They Have Not Exercised Their Authority**

Individuals who possess Section 2(11) authority are supervisors even if the authority has not been exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001); *Union Square Theatre Management* 326 NLRB 70 (1998). For example, in *Fred Meyer Alaska, Inc.*, the Board held that meat and seafood managers in Juneau and Fairbanks were statutory supervisors because they possessed the same authority as the meat managers in Anchorage, who were Section 2(11) supervisors. In reaching this conclusion, the Board noted that the employer’s operations were basically identical throughout the region, the hiring practices followed a general pattern across the organization, and the employer provided evidence of specific instances of hiring to establish that the meat and seafood managers in Juneau and Fairbanks possess the same authority to hire and/or make effective recommendations as the managers in Anchorage — even when a manager had no occasion to exercise his supervisory authority. (*Id.* at 683) (meat manager still supervisor even though he had not had occasion to hire; authority the same as all meat managers).

In another similar case, *Pepsi-Cola*, 327 NLRB 1062 (1999), the Board concluded that all account representatives with direct reports were Section 2(11) supervisors because the account representatives as a whole had authority to discharge. The Board refused to distinguish between “account representatives who in fact have exercised their authority to discharge and those who

have not; the determinative factor is that all such account representatives possess the authority to do so.” *Pepsi-Cola*, 327 NLRB 1062 at 1063.

All of the Shift Supervisors at BluePearl have authority to assign, hire, discipline, and reward — even if some of them have not had an opportunity to exercise that authority because they are new to the role. Further, the fact that Shift Supervisors may have exercised Section 2(11) authority even before they were formally promoted to Shift Supervisors has no bearing on the analysis. Job titles alone are not controlling. Instead, the Board looks at the specific evidence in the record to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006), citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000). Thus, where individuals within a particular job classification possess the same Section 2(11) authority, there is no distinction between individuals who have exercised their authority and those who have not; the determinative factor is that all individuals possess the authority to do so. As such, all Shift Supervisors should be excluded from the bargaining unit.

#### **7. Shift Supervisors Also Possess Secondary Indicia of Supervisory Status**

The Regional Director failed to analyze secondary indicia based on his erroneous conclusion that no evidence of primary indicia existed. Given that the Employer has established the existence of primary indicia (as discussed in detail above), the Regional Director’s failure to analyze secondary indicia was in error. Here, the evidence shows strong “secondary indicia” of supervisory status, in that: (1) elimination of the classification of supervisor would skew the ratio of supervisors to non-supervisors; (2) Shift Supervisors receive additional compensation; (3) Shift Supervisors are held out and considered to be supervisors; and (4) Shift Supervisors attend management meetings.

Evidence of secondary indicia is prevalent throughout the record. First, without the Shift Supervisors, there would be an unrealistic ratio of supervisors to non-supervisory employees. There are only three managers at the hospital — Ms. Baker, Ms. Walker, and Ms. Anderson. None of these individuals are present at the hospital after 10:00 p.m. and none of them work weekends. (Baker, Tr. 22:4-16). Because the hospital operates 24 hours per day, seven days per week, this would leave the facility with no supervisor for significant periods of time if the Regional Director's conclusion holds. Further, as the Tech Manager, Ms. Anderson would be responsible for supervising approximately 43 associates across a number of departments. See *Pennsylvania Truck Lines*, 199 NLRB 641 (1972) (employees considered statutory supervisors in part because there would not have been any supervisors on duty on weekends.)

Second, Shift Supervisors receive additional pay ranging from \$1 to \$2.50 per hour to perform supervisory job duties. (Baker, Tr. 49:6-14; Berge, Tr. 929:7-11; Mensing, Tr. 685:19-24; Smith, Tr. 1077:4-8; Ohashi, Tr. 1142:24-1143:22). The receipt of additional compensation is further evidence of supervisor status.

Third, Shift Supervisors are held out as supervisors by BluePearl and viewed as such by their direct reports. (*Id.*) Associates frequently approach Shift Supervisors to discuss issues they may be having at work or to discuss their career path. In fact, one employee (Taryn Holley) requested a *Weingarten* representative when Ms. Futran sought to speak with her about her poor job performance. (Futran, Tr. 882-883). From Ms. Holley's perspective, Ms. Futran is a supervisor.

Ms. Mensing regularly interacts with BluePearl's corporate headquarters in Tampa Bay, Florida. (Mensing, Tr. 52:14-22). Ms. Mensing testified that she was currently working with someone in the corporate marketing department to design new brochures for the Blood Bank, and

that she is part of the group with decision-making authority over the final design. (Mensing, Tr. 700:13-25; 708:2-10). Additionally, Ms. Mensing is responsible for the Blood Bank's community outreach program, and she coordinates outreach efforts to increase the public's awareness of the Blood Bank, and to recruit new donors for the program. (Mensing, Tr. 697:22-698:4). This includes a goal of attending six trade shows per year, which are selected by Ms. Mensing based on which events she believes likely to net the most donors. (Mensing, Tr. 701:1-20). Finally, Ms. Mensing is responsible for preparing quarterly financial reports to submit to Ms. Baker, and then meeting with Ms. Baker each quarter to discuss the report and the profitability of Ms. Mensing's department. (Mensing, Tr. 699:20-700:19). This evidence demonstrates that Ms. Mensing is viewed as a supervisor.

Fourth, all Shift Supervisors participate in special meetings with hospital management each month.<sup>23</sup> (Baker, Tr. 48:12-49:3). These meetings were led by Ms. Anderson, and covered topics such as protocol changes to be communicated to the Shift Supervisors' employees, information from corporate or the doctors to be conveyed to the employees, leadership development, relationship building, coaching support, and other tools the Shift Supervisors could employ to develop their skills as leaders. (Baker, Tr. 48:19-49:1).

## **V. CONCLUSION**

For the foregoing reasons, the Employer respectfully requests that the Board review and reverse the Regional Director's decision because the Regional Director's decision on substantial factual issues is clearly erroneous on the record and the error prejudicially affects the Employer's rights. In addition, the Regional Director's decision raises a substantial question of law and policy

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<sup>23</sup> Ms. Anderson temporarily suspended these meetings when the Shift Supervisor's status within the bargaining unit and at the bargaining table became an issue.

because the Regional Director failed to apply Board precedent regarding the analysis and application of the Board's Section 2(11) test as described in detail above. Further, pursuant to Section 102.67(j), BluePearl requests a stay of the Regional Director's decision as it relates to the Shift Supervisors pending consideration by the Board.

As discussed in detail above, the supervisory authorities in the Board's Section 2(11) test are listed in the disjunctive. Thus, if an individual possesses even *one* of the authorities listed in Section 2(11), that individual is a "supervisor" if the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and the authority is held in the interest of the employer. Here, the evidence in the record establishes that Shift Supervisors at BluePearl are supervisors with authority to assign, hire, evaluate and discipline.

**DATED** this 22<sup>nd</sup> day of August, 2019.

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## **DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Oregon that on this day a true and accurate copy of the document to which this declaration is affixed was filed with the Office of Executive Secretary/National Labor Relations Board and upon the Regional Director of Region 19 using the NLRB e-filing system and was served by email and U.S. Mail upon the following:

Emily Maglio  
Leonard Carder, LLP  
1188 Franklin St., Suite 201  
San Francisco, CA 94109

Dated this 22<sup>nd</sup> day of August, 2019, at Portland, Oregon.

/s/ Heather H. Adams  
Heather H. Adams